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No.

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72-1228

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

STATE OF ALASKA, *Petitioner*,

v.

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, FRIENDS OF THE EARTH, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The State of Alaska petitions for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit in its cases numbered 72-1796, 72-1797 and 72-1798, *Wilderness Society et al.* v. *Morton et al.*

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals is not yet reported. It is printed in the appendix to the petition of the Solicitor General seeking review of the same judgment of the Court of Appeals (pp. 1a-137a).

JURISDICTION

The judgment of the Court of Appeals (Sol. Gen. Pet. 139a-141a) was rendered on February 9, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The largest known undeveloped deposits of oil in the Western Hemisphere were discovered in 1968 beneath land owned by the State of Alaska on the far north Arctic coast of the State. Several oil companies have rights to develop the oil under leases from the State. A pipeline traversing federal land must be constructed before the oil can be put to productive use. Upon applications by the oil companies, the Secretary of the Interior decided to grant the right-of-way and issue the permits necessary to allow the construction of such a pipeline to carry the oil from Prudhoe Bay on the North Slope to the port of Valdez on the southern coast of the State. The Secretary's decision was based in part upon an exhaustive study, prepared in conformity with Section 102(2)(C) of the National Environmental Policy Act, that considered in detail the environmental impact of the Trans-Alaska Pipeline and alternative means of bringing the North Slope oil to consumers in the lower 48 states. The questions presented are:

1. Whether Section 28 of the Mineral Leasing Act, enacted in 1920 to permit the construction of oil and gas pipelines across federal lands by conferring general authority for the grant of rights-of-way of a specified width to accommodate pipelines and permanent associated features, precludes the grant of special permission to use on a temporary basis additional land

without which neither the Trans-Alaska Pipeline nor any other modern, large-diameter pipeline can be constructed.

2. Whether, apart from the width limitation of Section 28 of the Mineral Leasing Act, special land use permits for construction of the Trans-Alaska Pipeline are authorized by lawful regulations of the Department of the Interior.

3. Whether the six-volume environmental impact statement on the Trans-Alaska Pipeline and its alternatives, prepared over a two-year period at a cost of $9 million and accompanied by a three-volume economic and security analysis of the project and alternatives, complies with the requirements of the National Environmental Policy Act and fulfills the purpose of that statute to apprise federal decision-makers and others concerned of the environmental consequences of proposed federal actions and alternative courses of action.

STATUTES INVOLVED

Section 28 of the Mineral Leasing Act, 41 Stat. 449, as amended, 30 U.S.C. § 185, provides in pertinent part:

> "Rights-of-way through the public lands, including the forest reserves of the United States, may be granted by the Secretary of the Interior for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 181 of this title, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as

> common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable: . . . *Provided further,* That no right-of-way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations and conditions prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding."

Section 102(2)(C) of the National Environmental Policy Act, 83 Stat. 852, 42 U.S.C. § 4332(2)(C), provides:

> "The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall—
>
> ". . . .
>
> "(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes; . . . ."

STATEMENT

Oil was discovered in vast quantities in 1968 at Prudhoe Bay, where Alaska's Brooks Range of mountains slopes north to meet the Arctic Ocean. Alaska owns all of this oil because it was discovered beneath land that the State had acquired from the national government by selection pursuant to the statute admitting Alaska to the Union in 1959.[1]

The discovery was and is of transcendent importance to the State of Alaska. Although Alaska leased its

[1] Section 6 of the Alaska Statehood Act, 72 Stat. 340-43, provides for the grant to Alaska of a total of 103,350,000 acres of lands owned by the United States at the time of statehood upon selection of such lands by the State.

oil resources to oil companies that were in a position to put them to use, the State reserved a royalty interest and stands to benefit from a severance tax as well. Alaska perceives in its sovereign and proprietary interest in the North Slope oil the means of fulfilling the promise of statehood, the promise that by intelligent management and use of its natural resources Alaska can emancipate itself from its position as a national ward and assume its proper responsibility for attending to the needs of its citizens.

The North Slope oil discovery also was and is of enormous significance to the entire nation. In 1968 the country was just beginning to be concerned about the gap between energy needs and energy resources. Today that gap has grown into an energy crisis of major proportions. The North Slope discovery is large enough to have the potential of measurably lessening the nation's dependence on foreign oil at a critical time, thereby contributing importantly to our national security and to redressing our unfavorable balance of payments. Proven reserves at Prudhoe Bay are 9.6 billion barrels of oil—one quarter of total domestic reserves. No one doubts that many more barrels will be found. Lying over the oil is a natural gas cap that will yield 26 trillion cubic feet of gas, equal to 9 percent of domestic reserves. Both the oil and the gas are urgently needed.

The decision below threatens the momentous State and national interests just described. If allowed to stand, it would prevent the North Slope oil from being developed and transported to market in the lower 48 states for an extended, possibly intolerable, period of legislative deliberations, further litigation and perhaps additional administrative consideration. It would prevent indefinitely the construction of the pipeline that

is essential if the North Slope oil is to play its role in ameliorating the energy crisis of the later 1970's and 1980's.

1. Administrative Consideration of the Pipeline Right-of-Way and Related Permits

After extensive analysis, the companies responsible for developing the North Slope oil determined that a pipeline running north and south through Alaska was the preferable means of transporting the oil to where it can be used. The pipeline, 48 inches in diameter, would run 789 miles from Prudhoe Bay to the ice-free port of Valdez on the southern coast of Alaska. From there the oil would be trans-shipped in tankers to refineries on the west coast of the United States for the ultimate benefit of consumers.

For approximately one third of its length, the pipeline would traverse lands in which the State has an interest. The rest of the route consists largely of federal lands subject to withdrawal orders. Most of those lands have been withdrawn, pursuant to a specific Congressional enactment (note 6, *infra*), for a utility and transportation corridor to accommodate the pipeline. Because the pipeline would traverse these federal lands and would cross navigable streams, federal permission to build it was required. The Secretary of the Interior has charge of the administration of most federal land matters. Specifically, he is the officer authorized by Section 28 of the Mineral Leasing Act (pp. 3-4, *supra*) to grant rights-of-way over federal lands for oil and natural-gas pipelines.

Even before the oil companies applied for the right-of-way under the Mineral Leasing Act and other federal permits necessary for a pipeline, the federal government recognized that the development of the North

Slope oil resources was an urgent necessity. Early in 1969 the Secretary of the Interior named a North Slope Task Force. On the suggestion of President Nixon, who said that "it is urgent that we consider now the ways in which we can explore and develop, without destruction and with minimum disturbance, the oil resources of northern Alaska," the task force, originally limited to representatives of Interior Department agencies, was expanded to include representatives of other departments.

The oil companies submitted their original applications for the necessary pipeline rights-of-way and permits in June 1969. Some months later the National Environmental Policy Act, 83 Stat. 852, 42 U.S.C. §§ 4321 *et seq.*, was enacted; the President signed it on January 1, 1970.

Federal concern over the possible environmental consequences of the development of Alaska's oil resources thereafter was channeled into the preparation, pursuant to Section 102(2)(C) of the National Environmental Policy Act (pp. 4-5, *supra*), of "a detailed statement . . . on . . . the environmental impact of" the proposed action of granting a right-of-way for the pipeline. A draft environmental impact statement was published on January 15, 1971. The draft statement was sent to appropriate agencies for review and comment as well as being released to the public. Public hearings on it were held in Washington and Anchorage. A large number of written and oral comments were received.

Shortly after the hearings, the preparation of a final impact statement began. Three task forces with unified overall direction undertook the work. The members of the task forces were drawn from other government

departments as well as the Interior Department. Another group was already at work on the formulation of the stipulations that would govern the construction, maintenance and operation of the pipeline and the marine movement of oil. And still another group studied issues of economies and national security relating to the pipeline.

The principal result of this massive effort—what Secretary of the Interior Morton termed "an exhaustive and unprecedented three-year study of the ways to safely transport these valuable petroleum resources from the Alaska Arctic" (Jt. App. 69)[2]—was a six-volume, 3,250-page environmental impact statement and a three-volume economic and security analysis of the proposal and alternatives. Appended to the first volume of the impact statement are the governing stipulations. The statement was produced at a cost of approximately $9 million.

The statement deals in detail with all the environmental problems associated with the pipeline (and with the concomitant marine movement of oil) and with alternatives, including particularly alternative pipeline routes and other routes and systems across Alaska and across Canada and the alternative of deferral of action pending even more study. The discussion of each of the alternatives includes a description of its potential environmental impact. Account was taken of the likelihood that the natural gas associated with the oil would be transported by a completely overland pipeline route through Canada. The economic and security analysis volumes that accompanied

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[2] "Jt. App." refers to the joint appendix to the briefs of the parties filed in the Court of Appeals, copies of which have been lodged with the Clerk by the Solicitor General.

the impact statement gave the Secretary the benefit of systematic treatment of other factors that must enter into his decision.

The Secretary invited comments on the impact statement, and these were received and analyzed.

On May 11, 1972, the Secretary made his decision. He announced that he proposed to grant the right-of-way and permit applications as soon as he was legally free to do so. In a statement of reasons the Secretary concluded, on the basis of the material before him, that (1) "it is in the national interest for the North Slope oil to be developed and transported to market . . . [and] that such should be accomplished as rapidly as practicable," (2) the West Coast "is the preferable primary market for North Slope oil," and (3) the proposed Trans-Alaska Pipeline is environmentally "acceptable." (Sol. Gen. Pet. 162a, 163a, 173a.) With respect to the alternatives to the Trans-Alaska Pipeline that have been a principal concern of this litigation, the Secretary, first, concluded with respect to the comparative environmental merits and demerits of the Canadian alternative route and the Trans-Alaska route:

> "(1) each would involve significant environmental consequences; (2) neither route is superior in all respects; (3) each route has significant aspects in which it is superior to the other; (4) neither route is clearly preferable; and (5) the environmental consequences of each route, when weighed against the advantages to be derived from the construction of a pipeline, are acceptable" (*id.* at 172a),

and said, concerning the alternative of deferral:

> "There is now available to the Department sufficient data, studies and information with respect

> to all aspects of the Alyeska and State proposals and their consequences and alternatives, so that an informed and rational judgment with respect to them can be made. Any further deferral of a decision would delay development of the North Slope oil with the attendant adverse consequences which have been discussed above, and the limited advantages of deferral are not significant enough to warrant that delay. Accordingly, further deferral is not appropriate" (*id.* at 172a-173a).

With deferral ruled out and with environmental factors not yielding a clear preference for deferral or for the Canadian alternative to the Trans-Alaska route, the Secretary turned to other considerations: doubt that a Canadian line would ever be built and the prospect that at best there would be significant delay in the construction of such a line as compared with a Trans-Alaska line; the certainty that Canada would require a substantial part of the capacity of any Canadian line for Canadian oil whereas all of the capacity of a Trans-Alaska line would be available for the carriage of Alaskan oil and the delivery of it to other parts of the United States; and the fact that the Canadian line would not be able to deliver significant amounts of oil to the West Coast to relieve the dependency of that area on foreign oil. (*Id.* at 174a-176a.) In addition, the choice of the Canadian line would have an adverse impact upon Alaska and, especially, the Alaskan natives. (*Id.* at 176a; see also Jt. App. 83-86.) These considerations dictated the choice of the Trans-Alaska route.

The overriding consideration was that, as the Secretary put it on another occasion, "we need that oil as quickly as an environmentally safe delivery system can be developed," and a Canadian line might well take as

much as seven years longer to come into use than the Trans-Alaska line. (Jt. App. 69, 78.)

2. The Proceedings Below.

The litigation that led to the judgment of the Court of Appeals that prevents the Secretary's finding of an urgent need for the oil from being translated into action began with the filing of a complaint by the Wilderness Society and two other environmental groups in March 1970. On that complaint the District Court issued a preliminary injunction against the grant to the oil companies of a right-of-way for a haul road paralleling the pipeline route. 325 F. Supp. 422. The preliminary injunction remained in effect until the case was decided on the merits by the District Court.

In April 1971, the Cordova District Fisheries Union filed a separate complaint. It challenged the pipeline on environmental grounds, like the Wilderness Society complaint, and in addition challenged the legality of the grant by the Department of Agriculture of a permit enabling the oil companies to use land in a national forest near Valdez for the southern terminal of the pipeline. The two cases were heard together in the District Court and the Court of Appeals. David Anderson, a member of the Canadian Parliament, and the Canadian Wildlife Federation were allowed to intervene as plaintiffs in the Wilderness Society suit.

The Wilderness Society suit was pending throughout the period in which the draft impact statement and final impact statement were being prepared. The pendency of the suit gave the plaintiffs an unparalleled opportunity to follow, through discovery that was generously responded to, the federal decision-making proc-

ess. In addition, plaintiffs had the benefit of relevant documents from the files of the State of Alaska and Alyeska Pipeline Service Company, the corporation formed by the oil companies to act as their agent in the construction of the pipeline, after Alaska and Alyeska intervened in both suits in the summer of 1971. The plaintiffs also were allowed to take the depositions of responsible Interior Department officials, including the Secretary himself. The voluminous administrative record was assembled and indexed for the convenience of the court and the parties. The plaintiffs agreed that the case should be heard in the District Court without the taking of evidence but instead on briefs and argument relating to the several issues, based upon the impact statement and the related economics and national security volumes, the Secretary's decisional documents, the administrative record, the depositions and substantially any other documents, obtained by discovery or otherwise, that the plaintiffs wished to submit.[3]

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[3] The Court of Appeals erred in stating that the District Court dismissed the complaints "in response to a motion for summary judgment." (Sol. Gen. Pet. 92a.) The Wilderness Society plaintiffs filed a motion for summary judgment on the Mineral Leasing Act issue and the Cordova District Fisheries Union on the Forest Service permit issue. The defendants filed no motions for summary judgment. The mode of procedure that was followed was prescribed by an order entered by the District Court on June 14, 1972, which recited that "counsel for all parties have agreed to the following schedule for timely disposition of all issues [including those covered in the partial summary judgment motions of the plaintiffs referred to above] on their merits," established dates for the completion of discovery, the filing of briefs and other steps and provided that the parties should appear at "a plenary hearing to be conducted by this Court [on specified dates] for the purpose of addressing all issues on the merits."

Two issues were principally argued in the District Court (apart from the special complaint of the Cordova District Fisheries Union concerning the Forest Service permit for the Valdez terminal):[4]

1. There was no challenge to the authority of the Secretary of the Interior to grant, under Section 28 of the Mineral Leasing Act, a right-of-way for the pipeline to the extent of its width and 25 feet on either side. That was the permanent right-of-way that Alyeska applied for. Additional land was required temporarily for construction purposes, as it would be for any pipeline of similar size running over federal lands subject to the constraints of Section 28 of the Mineral Leasing Act. Under pertinent Interior Department regulations Alyeska had requested special land use permits for this purpose. These were challenged by the Wilderness Society plaintiffs as inconsistent with the Mineral Leasing Act and with the regulations pursuant to which the Secretary proposed to grant them.

2. It was asserted by all the plaintiffs that neither in the environmental impact statement nor elsewhere was there adequate treatment of the supposed alterna-

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[4] The Forest Service land on which construction of the Valdez terminal is planned has been selected by the State of Alaska pursuant to the Alaska Statehood Act. (Note 1, *supra*.) The Secretary of Agriculture has approved the selection. (Jt. App. 265-67.) (The Court of Appeals stated, erroneously, that the selection had not yet been approved but was expected to be approved soon. [Sol. Gen. Pet. 82a.]) There remain only ministerial acts on the part of the Secretary of the Interior leading to his patenting the land to Alaska. The Court of Appeals, in these circumstances, declined to rule on the validity of the Forest Service permit, saying that, if the permit retained any operative effect when the land was in Alaska's hands, its validity could be litigated then; otherwise the question would be moot on the passage of title to Alaska.

tive to the Trans-Alaska Pipeline of a pipeline running through Canada, and particularly was there no adequate treatment of a so-called common corridor through Canada. This latter point rested on the general assumption that the natural gas from the North Slope would be piped through Canada to the lower 48 states. The argument was that there would be a significant saving in environmental costs if the oil line followed a closely parallel path through Canada. The Secretary had found that any such saving did not offset the other advantages of a Trans-Alaska route and disadvantages of a Canadian route. (Sol. Gen. Pet. 174a.) The plaintiffs also asserted that there was inadequate consideration of the alternative of deferring a decision so that more data could be gathered.

The District Court denied the relief requested on all counts, ruling from the bench following two days of argument and the submission of comprehensive briefs. (Jt. App. 141-44.) Because of its judgment that the urgency of the project made it imperative that the case be sped on its way to higher courts as promptly as possible the District Court did not prepare an elaborate opinion or findings. (*Id.* at 141.)

3. The Decision of the Court of Appeals.

Upon representations as to urgency and importance in which all parties joined, the case was heard on an expedited basis in the Court of Appeals en banc. The court handed down its opinion and judgment four months after hearing argument. It reversed the District Court and directed the issuance of a decree enjoining the Secretary from issuing any special land use permit for the purpose of pipeline construction. (Sol. Gen. Pet. 139a-141a.)

Acknowledging that "it is impossible to build large-diameter oil pipelines if construction is to be limited to 25 feet on either side of the pipeline" (*id.* at 22a), the court decided, nevertheless, that the Congress that passed the Mineral Leasing Act in 1920 intended that construction work on a pipeline running through federal land must take place within the right-of-way defined by Section 28 of that statute (*id.* at 16a-51a). It based this judgment—a professed departure from what the court recognized as the commonsense "presumption against construing a statute so as to render it ineffective" (*id.* at 23a)—largely on statements in floor debates on bills in previous Congresses that were predecessors to the bill that became the 1920 Act (*id.* at 23a-39a). The court also held that the special land use permits that the Secretary proposed to grant were not sanctioned by his own regulations, although this ruling was described by the court as interrelated with its ruling under the Mineral Leasing Act. (*Id.* at 51a-62a).

The court sustained as within the Secretary's authority the grant of certain other permits and rights-of-way. (*Id.* at 62a-80a.) Among these was the grant to Alaska of a right-of-way for a state highway that will parallel the pipeline north of the Yukon River. The court also confirmed the federal grant of land to Alaska for the construction of airports along the route of the pipeline and of permission to Alaska to take gravel from federal land for construction purposes.

Four members of the court, a bare majority of the judges sitting, declined to decide the issues arising under the National Environmental Policy Act. The stated reason of the majority for their refusal to decide this critical issue that had been fully briefed and argued four months earlier was their desire to expedite

the court's own decision in the case. The majority judges assumed also that the decision on the NEPA issues would not affect the real outcome of the litigation because their holding on the Mineral Leasing Act "makes it impossible to construct this pipeline until Congress decides to amend the Act." (*Id.* at 98a.)

Three judges dissented from what the opinion of Judge MacKinnon, joined by two others, called "a monstrous refusal to perform a judicial obligation with respect to a vital matter . . . ." (*Id.* at 123a.) These judges considered the NEPA issues and concluded that the environmental impact statement was adequate to permit the Secretary to make an informed decision in which environmental consequences of the Trans-Alaska line and the Canadian alternative were appropriately considered. (*Id.* at 136a-137a.)

REASONS FOR GRANTING THE WRIT

The court below described this litigation over the Trans-Alaska Pipeline as a "great" case. It is, for all the reasons indicated by the court. It involves, as the court said, "billions of gallons of oil at a time when the nation faces an energy crisis of serious proportions . . . ." (*Id.* at 93a.) We leave to the Solicitor General to develop fully the implications of the delay resulting from the decision below in the flow of North Slope oil to an energy-hungry nation. We merely note the obvious fact that North Slope oil would meliorate the energy crisis and associated problems of national security and balance of payments.

The case also involves, as the court said, "hundreds of millions of dollars in revenue for the State of Alaska at a time when financial support for important social programs is badly needed," and "industrial develop-

ment and pollution of one of the last major unblemished wilderness areas in the world, at a time when we are all becoming increasingly aware of the delicate balance between man and his natural environment." (*Ibid.*)

The State of Alaska can speak with unique authority to those latter aspects of the greatness of the case and the reasons why they militate in favor of review by this Court of the decision below.

We take up first the court's reference to the Alaskan wilderness. Alaska is a frontier state. Its people are generally closer to nature than the residents of our more settled states. The north country, with its unmatched wilderness, is one of the State's proud assets.

That is one of the reasons why the State of Alaska has devoted the time and energy it has to working with federal officials in studying the pipeline proposal and in developing the stipulations designed to minimize any adverse effects of the pipeline. At least half the stipulations published with the impact statement were originally proposed by the State.

If the choice were between the basic integrity of the Alaskan wilderness and the industrial development that the State so desperately needs, the choice would be a difficult one for an Alaskan. Unlike the environmentalist in the lower 48, he must temper his regard for the wilderness with the knowledge that its beauties will not feed his children or those of his neighbor.

But, in the opinion of the responsible governmental officials of Alaska, the choice described above need not be made. On the basis of the impact statement, the stipulations and the State's own extensive research

on the effect of man's presence and his works on the Arctic world, those officials believe that the safeguards embodied in the pipeline stipulations are adequate to protect the Alaskan environment.

The sovereignty within whose boundaries the entire Trans-Alaska Pipeline will be constructed thus has made the considered judgment on the environmental issue that the project should go forward. Perhaps in our federal system Alaska's view as to where its welfare lies cannot be conclusive. But surely Alaska's view argues strongly in favor of review by this Court of the decision below. In *Alaska* v. *Arctic Maid,* 366 U.S. 199, 202 (1961), certiorari was granted "because of the importance of the ruling to the new State of Alaska." See also *New York* v. *United States*, 326 U.S. 572, 574 (1946), and, for a general discussion of this Court's role in adjudicating cases to which a state is a party, Wechsler *et al., The Federal Courts and the Federal System*, 244-87 (2d ed. 1973). The effect of the decision below is that the State must wait indefinitely for a judicial judgment as to the legality of a determination by the national government that the environmental impact of a project within Alaska's borders designed to permit exploitation of Alaska's resources is tolerable, a determination with which the State concurs.

When the State's need for the revenues that it will derive from North Slope oil is considered, any further delay in going forward with the project, let alone the indefinite delay threatened by the Court of Appeals' decision, is a calamity.

When Alaska achieved statehood in 1959 it lacked the extensive agriculture, manufacturing, transporta-

tion, industry, trade and commerce and population that have been the most significant sources of state revenues elsewhere in the United States. Congress conferred statehood in the belief that Alaska could become a self-sustaining, economic unit only by the careful management and timely harvest of its natural resources. See H.R. Rep. No. 624, 85th Cong., 1st Sess. 2, 7, 9-10, 20 (1957); S. Rep. No. 1163, 85th Cong., 1st Sess. 1 and *passim* (1957).

The need for governmental services and therefore governmental revenues is particularly acute in Alaska. The very lack of the usual agricultural, commercial and industrial underpinnings of a modern economy results in unemployment, poverty and human misery, particularly among the native citizens of Alaska, of a depth and on a scale that can scarcely be imagined by residents of the other states. Statehood did not magically alter Alaska's geography or climate. It remains an Arctic and sub-Arctic area, undeveloped economically by the standards of the rest of the country.

Under the pressure of human needs that cannot be met except by government, the State's expenditures have grown enormously in recent years. Revenues from the State's royalty interest in and severance tax on the North Slope oil have been counted on heavily as a means of enabling the State to continue the necessary growth in these expenditures. Because the revenues it will receive are reduced by the cost of transporting the North Slope oil to refineries, the delay in construction and resulting increases in the expected cost of construction already experienced have shrunk the revenues that the State can fairly expect, especially in the early years of oil production.

The annual general fund expenditures of Alaska's State government have grown from $41 million in 1959 to more than $300 million in 1972. Projected State budget requirements will continue to increase to $581 million in 1981 merely to meet inflation and population growth. A substantial deficit in recurrent revenues has existed since 1969 and in the current year is $118 million. This growing gap between revenues generated by state taxes and fees and expenditures has been filled by using the interest on and eating into the principal of $900 million that the State received from a bonus sale of North Slope oil leases in 1969. If the deficit continues to grow at the projected rate, the ability of the state to offset it by withdrawals from the bonus sale fund will end in 1977, when the entire fund will have been exhausted.

The construction of the pipeline will take two and a half or three years. The flow of oil through the pipeline will build up gradually. Not for several years will the pipeline be used to the extent of its 2 million barrel a day capacity. Only at that point will the State's revenues from the North Slope oil when added to its other revenues suffice to finance projected budgets. Already, therefore, the State is bound to think of cutting back on services to conserve the bonus fund. A further delay of, let us say, two years in the construction of the pipeline and the realization by the State of its North Slope revenues is bound to produce a budgetary catastrophe in the late 1970's, whatever decisions the State makes today.

In any event, a reduction in state expenditures and therefore services is nearly unthinkable, and particularly at this time. For the State's already serious problems are aggravated by the cutbacks and threat-

ened further cutbacks in federal spending on social services. Whatever Alaska's wishes, its economy remains closely tied to the federal budget, and it therefore suffers more than other states in a period of federal budgetary austerity.[5]

Finally, Alaskan natives, the State's neediest group and one of the nation's most impoverished minorities, will suffer peculiarly from the delay in constructing the pipeline. Under Section 9 of the Alaska Native Claims Settlement Act, 85 Stat. 694-95, Alaskan natives are to receive $500 million from the State to extinguish aboriginal title to land. This sum is to be paid from a 2 percent overriding royalty on leases of mineral and petroleum resources, including the North Slope oil resources. Alaska's native groups have already begun to organize effectively to exert greater control over their own future and to improve the lot of some of their members. Delay in realization of the North Slope royalty revenues would dampen their zeal. Delay would also postpone their receipt of revenues they badly need.[6]

In the light of all this, the principal reason why Alaska believes that the writ should be granted is that only by review in this Court can all the legal issues

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[5] Congress recognized that Alaska has unprecedented and difficult financial problems not previously encountered when new states were admitted in passing the Alaska Omnibus Act of 1959, 73 Stat. 141. See S. Rep. No. 331, 86th Cong., 1st Sess. (1959).

[6] Congress recognized the relationship between the satisfaction of the native claims and the construction of the Alaska pipeline by providing in § 17(c) of the Native Claims Settlement Act, 85 Stat. 708, for the withdrawal by the Secretary of the Interior of "a utility and transportation corridor across public lands in Alaska," which it was contemplated would be used for the pipeline, see H.R. Rep. No. 92-746, 92d Cong., 1st Sess. 45-46 (1971). The Secretary has made the withdrawal contemplated by the Act.

that stand in the way of prompt construction of the Trans-Alaska Pipeline be resolved. We now turn to a brief discussion of those issues.

1. The Court of Appeals' unrealistic, constraining construction of Section 28 of the Mineral Leasing Act affects more than the Trans-Alaska Pipeline, decisive as its effect on that project is. The court, as we have said, acknowledged that it is impossible to build large-diameter oil pipelines if the construction area is limited to 25 feet on either side of the pipeline. That means that under the court's decision modern petroleum pipelines can no longer be built over federal lands. That is a serious matter indeed at this time of energy crisis. It is especially serious for the western states where the need for transporting fuel over long distances is great and where a large portion of the land area is federal land.

The statutory question is thus of the greatest importance. And the unfortunate resolution of the question by the court below not only attributes to Congress the intent to frustrate its own purpose in enacting a statute but does so quite unnecessarily.

The court's conclusion is that a statute enacted in 1920 to authorize the construction of pipelines over federal lands has the opposite effect today of preventing such construction. The court's reasoning to that conclusion is circular and unpersuasive. The court first finds that the operative words of the statute, limiting the width of "rights-of-way through the public lands . . . for pipe-line purposes for the transportation of oil and natural gas," comprehend not only the permanent, lasting right-of-way for the pipeline and associated structures but also land used temporarily for construction of the line. That is said to be the "literal" mean-

ing of the statute. (Sol. Gen. Pet. 22a.) But by no means is the Court of Appeals' reading a compelled reading. Indeed, given the traditional meaning of the phrase "right-of-way" in judicial opinions, statutes and legal writings[7] it is the less likely of two possible "literal" meanings. The more likely meaning is that "rights-of-way . . . for pipe-line purposes" refers only to permanent pipeline uses.

Having thus given its own construction to the statute and attempted to still argument by terming its construction "literal," the court makes a bow to common sense by acknowledging that even the "literal" meaning of the statute would have to yield to the presumption that Congress meant it to be effective for its obvious purpose unless there were other indication of what Congress in fact meant.[8] (Sol. Gen. Pet. 22a-23a.) The court finds another indication in legislative history that has about as many defects as that uncertain tool of

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[7] Temporary land uses have historically been recognized as different from rights-of-way in the nature of permanent easements. See Great Northern Ry. v. United States, 315 U.S. 262, 271 (1942); United States v. Welch, 217 U.S. 333, 339 (1910). See also Lewis v. Standard Oil Co., 88 F.2d 512 (9th Cir. 1937); 3 H. Tiffany, *Real Property* § 772 (3d ed., Jones, 1939 with 1972 supp.); Annot., 49 A.L.R.2d 1191; 28 A.L.R.2d 626; 25 Am. Jur. 2d, *Easements and Licenses* § 7.

[8] The court quite sensibly followed that presumption in another part of its decision. The Wilderness Society plaintiffs challenged the inclusion of pumping stations, which occupy far more space than the width of a line of pipe and 25 feet on either side, in the § 28 right-of-way grant. Ruling against them, the court held that "pumping stations are part of the 'pipe line' as that term is used in Section 28" because "oil could not flow through a pipeline for any significant distance by the force of gravity alone." (Sol. Gen. Pet. 63a-64a.) It is no more strained to interpret "right-of-way" modestly to encompass only rights in land permanently appropriated, thereby permitting pipelines to be built, than it is to interpret "pipe line" expansively to include pumping stations, thereby permitting pipelines to operate.

statutory construction ever has: the history the court recites consists solely of fragmentary remarks on the floor of one house in debates on bills that were never enacted; the debates occurred in Congresses other than the Congress that enacted the statute being construed. (*Id.* at 23a-39a.) There is no mention of the width limitation in any of the committee reports on the bill enacted in 1920 or the predecessor bills. The court concedes some of these infirmities but then adds, remarkably, that "there appears to be no reason for not accepting this history for its obvious import." (*Id.* at 38a.) The reason is that the history supports "the literal reading." But the "literal" reading to which the court refers is of course its own choice between two equally possible constructions. Similarly, the established administrative practice of issuing special land use permits for construction beyond the Section 28 width limitation is disregarded because it is inconsistent with the same "literal" reading. (*Id.* at 40a-51a.)[9] Thus, the Court of Appeals' decision rests ultimately on its ipse dixit that "right-of-way" necessarily compre-

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[9] Contrary to the assertion of the court below (Sol. Gen. Pet. 47a), the practice of issuing permits for the temporary use of land for constructing pipelines has been brought to the attention of Congress. Notably, it has been so brought in connection with the Trans-Alaska Pipeline itself. *Hearings on the Alaska Pipeline before the Subcommittee on Fisheries and Wildlife Conservation of the House Merchant Marine and Fisheries Committee*, 91st Cong., 1st and 2d Sess. 262-63 (1969); *Hearing on Oversight of Oil Development Activities in Alaska before the Special Subcommittee on Legislative Oversight of the Senate Interior and Insular Affairs Committee*, 91st Cong., 1st Sess. 6, 11, 23 (1969). The disregard by the court below of the established administrative practice is a factor separately warranting review here, Patterson v. Lamb, 329 U.S. 539, 541 (1947), especially in the light of Congressional awareness of the practice, Zemel v. Rusk, 381 U.S. 1, 11 (1965).

hends the space needed temporarily for pipeline construction.

The statutory question is therefore substantial as well as of great practical importance.

To be sure, the court below was correct in saying that Congress could amend the Mineral Leasing Act to eliminate the anomaly that the court read into it. And it is no secret that bills to amend the Act have been introduced in the wake of the Court of Appeals' decision. See, *e.g.*, S. 970, 993, 1056, 1081; H.R. 4707, 93d Cong., 1st Sess. (1973). But the introduction of bills designed to correct a judicial mistake is not a reason for this Court to stay its hand. The principal grist of this Court's mill is federal statutes to be construed; in many cases it could be urged that Congress is in a position as good as or better than this Court's to correct a lower court's erroneous interpretation of a statute.[10]

2. A bare majority of the sitting judges below left undecided the principal issue in the case, the adequacy

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[10] The court below also held that the special land use permit for construction was not authorized by the Interior Department regulations under which it was issued. This holding principally relates back to the court's misconstruction of § 28 of the Mineral Leasing Act. The regulation authorizing special land use permits authorizes them to be issued "for special purposes not specifically provided for by existing law." 43 C.F.R. § 2920.0-2(a). On the court's view of § 28, pipeline construction space is a purpose specifically provided for by law. The regulations also provide that a permit shall "be revocable in the discretion of the authorized officer at any time . . . ." 43 C.F.R. § 2920.3(a)(1). The court held that the permit was not revocable in fact. Alyeska in applying for special land permits for construction specifically agreed to the condition of revocability, and, as Judge MacKinnon found (Sol. Gen. Pet. 108a-123a), the criteria for revocability in law and in fact that have been customarily applied are satisfied in the case of the Trans-Alaska Pipeline construction space.

of the environmental impact statement on which the Secretary of the Interior's decision to grant necessary rights-of-way and permits for the Trans-Alaska Pipeline was based. Three judges dissented from this "monstrous refusal to perform a judicial obligation," considered the adequacy of the statement and found it adequate. This Court therefore has the benefit of the opinion that Judge MacKinnon wrote on their behalf analyzing the impact statement.

This Court should not indulge in the same "monstrous refusal" to decide the environmental issue as the Court of Appeals. What is called for, as we have tried to demonstrate in all the foregoing discussion, is a prompt judicial resolution of the issues. If, in light of that resolution, further legislation or administrative proceedings are called for, that should be known soon. If not, the project can and should proceed at once, to the undoubted benefit of the national economy as well as of Alaska.

The failure of the court below to decide the environmental issues may leave Alaska unable to go forward with a state highway paralleling the pipeline, even though the court held that the State could lawfully acquire a right-of-way for the highway over federal land. The court properly rejected as an impermissible assault on Alaska's sovereignty a contention of the plaintiffs that the right-of-way could not legally be granted because the highway will be built for Alaska by Alyeska, which will find the highway useful in constructing and maintaining the pipeline. (Sol. Gen. Pet. 70a-79a.) Alaska, it should be said, fully intends to begin construction of the highway as soon as it is legally free to do so despite the ruling below on the Mineral Leasing Act. But apparently the

project cannot proceed until the impact statement (which covers the highway as well as the pipeline) is judged adequate. The affront to Alaska's sovereignty resulting from the court's refusal to decide is as serious as the plaintiffs' assault which the court rejected.

The Court of Appeals' opinion leaves matters in a hopeless posture. More worrisome perhaps than any other aspect of that opinion is the statement by the majority indicating that, if the majority judges were to consider the impact statement, they would find disputed issues of fact the resolution of which "would require testimony and cross-examination of witnesses and other incidents of judicial fact finding." (Sol. Gen. Pet. 92a-93a.)

It is bad enough that such a full-scale trial should be proposed in a proceeding for the review of agency action, a proceeding in which the plaintiffs were wholly satisfied with a procedure that had allowed them to probe deeply into the bases of the agency decision. Compare *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 420 (1971), where the Court said that the normal basis for review is the "full administrative record" before an agency at the time of its decision and indicated that examination of the decision-makers, such as was allowed here, ordinarily need not be allowed when, as was the case here, administrative findings are made at the same time as the decision. The plaintiffs, in short, have already had more than their due.

What aggravates the situation is that the remark relative to the need for an evidentiary trial was a mere suggestion of four judges. The District Court apparently has no authoritative direction except to sit

on the unresolved NEPA issues pending amendment to the Mineral Leasing Act. The potential for loss of time is staggering.

Furthermore, the issue posed under NEPA is one that warrants review by this Court in any event: if an impact statement of the magnitude and scope of the impact statement here, representing the tremendous effort that went into its production, is nevertheless subject to judicial second-guessing—upon an evidentiary trial, no less—then Section 102(2)(C) has indeed become a vehicle for thwarting the conduct not only of governmental affairs but, in this case, of private undertakings that happen to require federal licenses—and of undertakings of a sovereign state. Compare *Aberdeen & Rockfish R.R.* v. *SCRAP*, 409 U.S. 1207, 1217-18 (1972) (opinion of the Chief Justice on application for stay). See *Joint Hearings on the National Environmental Policy Act before the Senate Public Works and Interior and Insular Affairs Committees,* 92d Cong., 2d Sess. (1972), especially at 391-404, 420-23 (testimony of Assistant Attorney General Cramton).

Judge MacKinnon's opinion demonstrates the lack of substance to the plaintiffs' arguments that there was inadequate consideration of the supposed Canadian alternative to the Trans-Alaska line and the alternative of a deferral of decision. Indeed, as he shows, the Canadian alternative is so speculative that it may not qualify as the kind of alternative that an administrator is bound to consider under NEPA even if the expansive opinion of the court below in *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827 (D.C. Cir. 1972), is accepted as the law.

We should add here an additional reason why the Canadian alternative is not a real one: The oil company pipeline consortium has demonstrated its readiness to build the Trans-Alaska Pipeline, through the investment of millions of dollars and the filing with federal and state governments of applications for necessary approvals. No other entity has manifested any comparable intention or plausibly demonstrated the capability to build a different line—a line running partly through Alaska and partly through Canada—or the ability to obtain the requisite permits from Canada, its provinces or the State of Alaska, over some of whose land any pipeline designed to exploit the North Slope oil must travel.

The necessary permits from the State of Alaska for a pipeline running partly through Canada might not be readily had. The State would see such a pipeline as depleting its publicly owned resources without earning for the people of the State the benefits to which they are entitled and on which the Congress intended that they should depend. The people of the State might well be better served by locking up their resources, whatever hardship is involved, than by chancing their fortunes in an economic venture as fraught with hazard as a Canadian line would be. In short, the only true alternative to issuing a permit for the Trans-Alaska Pipeline is not issuing the permit. To rely upon the possibility that a successful Canadian pipeline builder will arise if the present application is denied is dangerously to speculate with the public interest of the people of Alaska and of the United States.

CONCLUSION

The writ should be granted. The case should be heard promptly so as to permit decision before the Court rises for the summer recess and thus eliminate the uncertainty that now beclouds the future of a project vital to the State of Alaska and the nation.

Respectfully submitted,

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March 1973

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Nos. 72-1227, 1228, 1229

In The
Supreme Court of the United States
October Term, 1972

Rogers C. B. Morton, Secretary of the Interior, et al.,

Petitioners,

v.

The Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth, et al.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-1227, 1228, 1229

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

v.

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., and FRIENDS OF THE EARTH, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATEMENT

The petitions for certiorari present no issue which warrants further review by this Court. In urging this position, respondents [1] rely principally upon the

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[1] The principal respondents in the case are three environmental organizations, The Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth, who are the original plaintiffs in the Alaska Pipeline litigation. The other respondents are David Anderson and Canadian Wildlife Federation, who were allowed to intervene in *The Wilderness*

careful and comprehensive analysis of the issues contained in the exhaustive opinion of the court of appeals, sitting *en banc*. Gov. Pet. App. A.

In reaching the unanimous conclusion that Congress must decide whether to amend the Mineral Leasing Act of 1920, all seven judges who heard the case were keenly aware of "the obvious magnitude and current importance of the interests at stake." Gov. Pet. App. A 93a. But the petitioners could not convince even one of the judges that the relief they seek should be obtained from the courts, rather than from the Congress. The essence of the decision below, as the court of appeals noted, "is as settled as it is simple." Gov. Pet. App. A 94a.

> "Congress, by enacting Section 28, allowed pipeline companies to use a certain amount of land to construct their pipelines. These companies have now come into court, accompanied by the executive agency authorized to administer the statute, and have said, 'This is not enough land; give us more.' We have no more power to grant their request, of course, than we have the power

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Society suit by order dated May 11, 1972, and The Cordova District Fisheries Union, whose separate suit (filed on April 28, 1971) was consolidated with *The Wilderness Society* suit.

All respondents join in this opposition. In the remainder of this brief, however, the term "respondents" refers, unless otherwise stated, to The Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth.

> to increase congressional appropriations to needy recipients.
>
> * * * *
>
> "We think it plain that the Executive Branch, when confronted with the legal problems attendant upon the Alaska pipeline, should have taken note of the limitations that had been prescribed by Congress, and should have presented to Congress the case for revision of the basic statute." Gov. Pet. App. A, 93a-94a, 97a.

Judge Wilkey, concurring in the court's Mineral Leasing Act decision, stated: "Regrettably, the would-be builders of the Alaska Pipeline sought from the courts rather than Congress clearly necessary changes in the statutory restrictions on the use of public lands." *Id.*, at 137a. Judge MacKinnon, in his separate opinion, agreed: "Alyeska must now go to Congress for an amendment. . . . That is regrettable . . . but it is Congress that has the legislative power and not this court." *Id.*, at 122a.

Petitioners devote a considerable portion of their petitions to broad and potentially complex issues, neither reached nor considered by the court of appeals, relating to the National Environmental Policy Act ("NEPA"). Those issues are not in a proper posture for review by the court at this time and do not provide an additional basis, apart from the Mineral Leasing Act issues, for granting review. As noted by the court of appeals, pending a Congressional resolution of the Mineral Leasing Act issues, the present

"analysis of environmental, economic and other costs . . . may become outdated, and in its updating the Department conceivably might introduce changes mooting anything we might say about its present adequacy or inadequacy." Gov. Pet. App. A 90a. As demonstrated at pages 16-19, *infra*, legislative and other developments have already confirmed the correctness of this conclusion.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

IT IS FOR CONGRESS, NOT THE COURTS, TO DETERMINE WHETHER THE MINERAL LEASING ACT SHOULD BE AMENDED

1. The court of appeals considered the Mineral Leasing Act issues in meticulous detail. Every canon of statutory interpretation dictates the court's unanimous conclusion that construction of the Alaska Pipeline would violate the Mineral Leasing Act. These include the plain meaning of the statute (Gov. Pet. App. A 16a-23a), its legislative history (*id.*, at 23a-39a), its contemporaneous interpretation by the agency charged with its administration (*id.*, at 21a), and the settled construction of the administrative regulations of that agency (*id.*, at 40a-62a).

In their briefs, petitioners essentially ignore the added fact that an amount of land much wider than that provided for in the Mineral Leasing Act is permanently necessary for access and maintenance, as well as construction, of the pipeline. It was on this point that Judge MacKinnon joined the other six judges in the conclusion that Congressional approval is nec-

essary. The Government's assertion that all that will be needed are "temporary permits for access and maintenance" (Gov. Pet. 23) is simply untrue. See Gov. Pet. App. A 56a-61a; Gov. Pet. App. A 119a-123a.

2. The court of appeals was also correct in concluding that the unambiguous proscription of the Mineral Leasing Act is not overcome by what petitioners' counsel now attempt to characterize as "long standing and consistent administrative interpretation of the statute" (Gov. Pet. 23-24). No such established interpretation exists. As the court of appeals held, it is to be found nowhere in "a formal rule or through any other 'expressly articulated position at the administrative level.' " Gov. Pet. App. A 47a.

The court further noted the irony that the same parties who now assert the existence of a "settled and well known administrative practice . . . apparently did not know about the practice" when the first application for rights of way was made in 1969. Gov. Pet. App. A 45a-46a. The result, moreover, of a subsequent three-year search by petitioners' counsel into the files of Interior Department field offices produced no more than a handful of isolated, vague, and inconclusive low-level administrative lapses to which the court of appeals properly gave little weight. Gov. Pet. App. A 51a.[2]

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[2] The three-year search (1969-1972) by petitioners' counsel uncovered exactly five documented instances—none occurring prior to 1960—in which Interior Department field offices were

3. The decision of the court of appeals was not petitioners' first indication that the Mineral Leasing Act stood as a threshold bar to the Alaska Pipeline.[3]

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requested to issue or did issue construction-related special land use permits for pipelines. Three of them involved a total distance of less than 32 miles. The fourth appeared to be merely an undated application with no permit attached. And the fifth was issued almost a full year after the district court's preliminary injunction in the instant case. (Government's Brief to the Court of Appeals, Appendix B). Petitioners' counsel endeavored to supplement this scanty showing with affidavits by field-level Interior Department employees and industry pipeliners. Collectively, these affidavits identified only four specific instances in which pipeliners were alleged to have been given even informal access to public lands outside the statutory right-of-way. The earliest such instance identified was alleged to have occurred in 1953. And, no indication was given in the affidavits as to the actual amount of additional public land affected. (Alyeska Supplemental Documents I, Tabs 1-9).

The court's conclusion—"that this history [n]either merits our deference [n]or leads us to ignore an ascertainable legislative will to restrict construction activities to the statutory right-of-way," Gov. Pet. App. A 51a—is not merely correct. It is a charitable understatement.

[3] Indeed, in a cover letter to the Undersecretary of the Interior submitting the oil companies' initial permit application of June 6, 1969, their attorney Kenneth P. Fountain acknowledged that:

> "*The 54' R.O.W.* [*right of way*] *width which is allowed by statute is not adequate for the construction of a 48" pipeline.* The R.O.W. should be 100' width to accommodate the extremely large equipment that is necessary to handle the 48" pipe, and the large spoil [from] excavated soil . . . ." (Emphasis added.) Respondents' "Rule 9(h) Documents," Tab B.

The Mineral Leasing Act was a principal basis on which the district court issued its preliminary injunction in this case three years ago. *Wilderness Society* v. *Hickel*, 325 F.Supp. 422, 423-24 (D.D.C., April 28, 1970) (Findings ¶ 2, Conclusions ¶ 5). See Gov. Pet. App. E 183a-185a. Yet, despite this unambiguous early warning, petitioners did nothing to bring the matter to the attention of Congress and to seek a calm and dispassionate legislative resolution.[4]

The matter has now, however, finally been presented squarely to Congress. Within the past few weeks bills have been introduced seeking to amend the Mineral Leasing Act (S. 1040, S. 1056, and H.R. 4651), to update all public land laws dealing with

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[4] The Congressional hearings cited at Gov. Pet. 24 n. 14 and Ala. Pet. 25 n. 9 were also cited in petitioners' briefs to the court of appeals. All of these hearings preceded even the preliminary injunction in this case. None was addressed to the underlying legality of the Secretary's proposed action.

The Government's citation to the Alaska Native Claims Settlement Act of 1971, Gov. Pet. 24-25, (which was also cited in petitioners' briefs to the court of appeals) defies understanding. When the Act was passed, the preliminary injunction in this case was still in effect. The legislative history of the Act unambiguously states that (a) neither the conference committee nor the House or Senate Committees "consider[ed] the proposed pipeline" in their deliberations; and that (b) if "the Secretary should . . . decide to grant the necessary permits, nothing . . . should be construed in any manner to limit, diminish, or condition the Secretary's *existing authority* to take any action required to implement this decision." (Emphasis added.) H.R. Rep. 92-746, 92d Cong., 1st Sess. 46 (1971).

rights-of-way (S. 1041 and S. 1081), to approve the Alaska Pipeline project (S. 970), to approve an alternative trans-Alaska-Canada project (S. 993, H.R. 4707), and to authorize an independent Congressional review that would lead to a prompt and final approval by Congress of either the Alaska Pipeline project or an alternative trans-Alaska-Canada project (H.R. 5750). Hearings have already commenced on several of the bills. *Hearings Before the Senate Interior and Insular Affairs Committee on Pending Legislation to Establish a Federal Policy Concerning the Granting of Rights-of-Way Across Federal Lands*, 93d Cong., 1st Sess. (March 9 and March 27, 1973). At long last, therefore, the matter is where it belongs, not in the courts but before Congress which has the plenary power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2.

4. Finally, the decision below is not only clearly correct but does not conflict with the decision of any other circuit and has no impact on any public land law other than the Mineral Leasing Act. See Gov. Pet. App. A 48a-51a. The decision may, of course, lead to a new look by Congress at the need for a general updating of the current right-of-way laws, which have been enacted haphazardly over the course of a hundred years. But that, again, is a project not for the courts but for the Congress, the branch of government with plenary power over the public lands.

There is no justification, under the considerations governing review on certiorari set forth in Rule 19 of this Court's Rules, for further judicial review of the Mineral Leasing Act issues. The important policy issues underlying the litigation constitute, we submit, a compelling reason to deny the writ, not to grant it. Petitioners should take their case for obtaining use of the public lands to Congress, where the policy issues they raise in their briefs may be debated and resolved on the merits.

THE NEPA ISSUES ARE NOT IN AN APPROPRIATE POSTURE FOR REVIEW BY THIS COURT

1. Respondents submit that the threshold Mineral Leasing Act issues alone should determine the disposition of the petitions for certiorari. There has been no opinion rendered by the court of appeals on the potential NEPA issues in the case. Nor are there any useful findings and conclusions by the district court on those issues. See Gov. Pet. App. D 179a-182a.

Accordingly, if this Court should grant the petitions for certiorari, respondents respectfully suggest that the review be limited to the Mineral Leasing Act issues. Were the Court to reverse the court of appeals' unanimous conclusion that the Mineral Leasing Act is a threshold bar to the Alaska Pipeline, it would then appear appropriate to remand the case to the court of appeals for reconsideration of its disposition of the NEPA issues. For the court of appeals' decision not to address those issues rests primarily on the

court's conclusion that the NEPA issues are not ripe for adjudication so long as it is necessary for Congress to act before the Alaska Pipeline can be approved.

2. If the court of appeals was correct in its Mineral Leasing Act decision (and, as we have already indicated, it clearly was), its decision not to address the NEPA issues was a sound exercise of judicial discretion, amply supported by decisions of this Court. *E.g.*, *Poe* v. *Ullman*, 367 U.S. 497, 503 (1961); *id.*, at 528 (Mr. Justice Harlan, dissenting). The court of appeals correctly reasoned that the need for prior Congressional approval renders the NEPA issues [5]

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[5] The NEPA issues specifically raised by respondents below (and considered by them to be set forth in Question 3 of the instant petitions or fairly comprised therein, Sup. Ct. Rule 23 1 (c)) are, as set forth in respondents' brief to the court of appeals:

> "I. Whether the Secretary has complied with the Act's requirement that he consider the alternative of oil and gas pipelines in a common corridor through Canada, when he: (a) did not systematically analyze the apparent advantages of this alternative; and (b) devoted nearly all his efforts to the study of the proposal of the applicant oil companies.
>
> "II. Whether the Secretary has complied with the Act's requirement that he consider the alternative of deferring decision, when he did not evaluate the benefits of deferral in reducing environmental degradation.
>
> "III. Whether his "Final Impact Statement" was a proper final statement when an adequate draft statement never was prepared.
>
> "IV. Whether the Secretary's decision was arbitrary and capricious because it was based upon speculation regard-

remote and that Congressional action could moot, or developments pending Congressional action could alter, the balance of economic, environmental, and other factors bearing on a final resolution of the NEPA issues.

The result reached by the court of appeals is, incidentally, precisely the result that respondents had urged the district court to reach some nine months before the court of appeals rendered its decision.[6] As will be seen at pages 16-19, *infra*, the correctness of the result reached below is corroborated by legislative and other developments that have already occurred.

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ing factors about which concrete information could have been obtained."

[6] On May 12, 1972, the day after Secretary Morton announced his decision to approve the Alaska Pipeline, respondents filed in district court a Motion for Partial Summary Judgment on the Mineral Leasing Act issues, together with a 48-page brief on those issues. The Motion stated, in pertinent part:

> "[T]he Mineral Leasing Act issues present threshold questions. . . ; the NEPA issues need be adjudicated only if the permits contemplated by the Secretary are not prohibited by the Mineral Leasing Act; and if said permits are prohibited by the Mineral Leasing Act, it would be a waste of judicial time and effort for this court to adjudicate the far more complicated NEPA issues which would, in that event, be reduced to hypothetical questions." Motion of Respondents for Partial Summary Judgment, May 12, 1972, p. 1.

3. Before discussing these developments, respondents feel constrained—in view of petitioners' one-sided summaries—to place the principal NEPA issue in what we submit is its proper factual context. The ultimate question, as the court of appeals has said, and as Secretary Morton has himself acknowledged, is which of two *feasible* alternatives will be adopted: (1) an oil pipeline route across Alaska, *plus* marine tanker transport of oil along the West Coasts of the United States and Canada, *plus* a completely separate pipeline route for North Slope natural gas across Canada (hereafter the "Alaska Pipeline alternative"), or (2) one all-land trans-Alaska-Canada route that would provide a common corridor for oil and gas pipelines to Midwest markets (hereafter the "Canadian alternative"). Gov. Pet. App. A 88a; Secretary Morton's Statement of Reasons, Gov. Pet. App. C 173a-174a.

It is respondents' position that "from the beginning of its consideration of the oil companies' proposal to construct a trans-Alaska oil pipeline the Department of the Interior has been aware that if North Slope oil resources are developed at all natural gas (which is an inevitable byproduct of oil extraction) will be transported to market [by the very oil companies proposing the trans-Alaska oil pipeline] by means of an all-land pipeline route through Canada." (Footnote omitted.) Gov. Pet. App. A 87a. The obvious question, therefore, has always been: If there is going to be a route across the Canadian Arctic in any

event, might there not be substantial environmental and economic savings from using a single all-land route for oil and gas pipelines? Yet, because the oil companies mentioned only North Slope oil in their proposal to the Interior Department, the Department has consistently focused only on oil—almost as if the natural gas, and the alternative of an all-land common corridor, did not exist. Secretary Morton has repeatedly articulated his Department's passive approach: "The scope of our work here is to deal with applications on our desk." *E.g., Hearings, Senate Committee on Interior and Insular Affairs*, 92d Cong., 1st Sess. 454 (April 29, 1971). See Gov. Pet. App. A 88a-89a.[7]

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[7] The Department's approach to the Canadian alternative was well-summarized by Secretary Morton on March 9, 1972, only eleven days before release of the final impact statement:

> "We have no formal discussions going on with any element of the Canadian Government. The prime discussions have been between the Canadian Government and the applicants. . . . The only way [Canadian Government expressions of interest in an all-land route] could change the plans is if a Canadian alternative was developed, and we had an application which we could consider of an alternative route through Canada. This could very well change the plans of the present applicants, but we have to remember that this is not a Government project." *Hearings, Senate Committees on Public Works and Interior and Insular Affairs*, 92d Cong., 2d Sess. 404-405 (March 9, 1972).

This passive approach stands in marked contrast to the role the Secretary has announced he will assume in helping the oil

The Department's ostrich-like approach to the Canadian alternative has been, in respondents' view, remarkably similar to the approach it took to the Mineral Leasing Act problem. The Department's draft impact statement of January 1971 (cited at Gov. Pet. 9-10) was severely criticized for its failure even to mention North Slope natural gas and the alternative of an all-land common corridor.[8] Yet, de-

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companies transport North Slope natural gas across Canada, if that is their desire:

> "[W]e are going to . . . work and stimulate and motivate a consortium to get together and put the money up to build a cold gas pipeline, which through Canada is the logical way for it to go." Interior Department Transcript of Secretary Morton's Press Conference of September 13, 1972, at 38.

[8] For example, in a statement dated March 12, 1971, criticizing the draft, the Administrator of the Environmental Protection Agency asserted:

> "[A] Mackenzie Valley pipeline would not cross an area of major seismic activity, as a trans-Alaska pipeline would. Overland transport from Prudhoe Bay directly to Chicago would not require transfer facilities from pipeline to ocean tankers and would not require a large fleet of tankers to operate along the coastline from Alaska to California. Even if a substantial portion of the oil were transported by pipeline to the West Coast, tanker transport and tanker facility requirements would seem to be considerably reduced.
>
> "There is a high probability that, given Canada's interest in opening up its interior reserves and the Alyeska Pipeline Company's apparent intention to construct a pipeline through the Mackenzie Valley to transport natural gas from Prudhoe Bay, at least one and possibly two pipelines already will be constructed across the Mackenzie

spite this unambiguous early warning, it was not until February 1972, just one month before publication of the final impact statement, that the Department decided to include in the statement any discussion at all of North Slope natural gas. See Gov. Pet. App. A 88a. And then, the Department did not even ask the oil companies to disclose their plans for the natural gas; and it did not seek to acquire from either private industry or the Canadian Government basic information that would be essential for any meaningful evaluation. Brew Dep. 28-29, 113-115.[9] Nor, as respondents have contended, did the Department ever undertake to determine what the potential environmental savings might be from the Canadian common corridor alternative. Brew Dep. 34-35.[10]

Valley. It would seem preferable, from the point of view of minimizing environmental impact, to use a single route for more than one pipeline rather than having multiple pipeline routes." See Final Impact Statement, vol. 6, p. A-42.

[9] Dr. Brew was the Interior Department geologist responsible for drafting the final impact statement.

[10] Respondents contend that nowhere in the final impact statement generally, or in the "500-page volume . . . devoted . . . to . . . possible alternatives" (Gov. Pet. 10) is the alternative of an all-land common corridor for oil and gas pipelines analyzed. See Gov. Pet. App. A 88a. The so-called "consideration" given to the alternative trans-Alaska-Canada common corridor in the "option papers and memoranda," referred to at Gov. Pet. 11, amounts to no more than what one could deduce merely from glancing at a map. Specifically, on the day before Secretary Morton announced his decision to ap-

4. The opinion below accurately sets forth the general thrust of the opposing positions on the Canadian alternative issue. Gov. Pet. App. A 86a-90a. As the court recognized, "This and other NEPA issues [11] presented by the parties to this action pose complex and important questions regarding the duties of administrative agencies under NEPA." (Footnote added.) *Id.*, at 90a. But, assuming that the court of appeals correctly construed the technical issues presented by the Mineral Leasing Act, its decision not to address the NEPA issues was obviously correct.

a. Secretary Morton has himself stated, in testimony given to the Joint Economic Committee *after* the announcement of his decision to approve the Alaska Pipeline (cited at Gov. Pet. 14 n.5), that he would "scrap $300 million and all of the work that has been done" on the Alaska Pipeline, if the balance of factors in the national interest were changed (J.A. 106). By the time Congress removes the current Mineral Leasing Act width limitation (if that is all Congress does), there may be substantial developments

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prove the Alaska Pipeline, the individual in the best position to know—Dr. Brew, the drafter of the impact statement—informed his superiors that a common corridor analysis had not, but should have been, undertaken, and that if it had been undertaken it would have undoubtedly disclosed that "the joint oil and gas trans-Canada corridor is clearly to be preferred on environmental grounds." Ad. Rec. 2.15.

[11] See p. 10 n. 5, *supra*.

that will materially alter the balance of economic, environmental, and other factors bearing on the Canadian alternative. Indeed, a number of recent developments—summarized in the appendix to this brief—may have already materially altered that balance.[12]

b. Equally important is the court's awareness that the terms and conditions of any legislation passed by Congress will be directly germane to any NEPA analysis. This would be true even if Congress were merely to remove the current Mineral Leasing Act width limitation. For example, one of the principal bills now under consideration (S. 1081, sponsored by Senator Jackson) would make "common corridors"

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[12] The developments cited in the appendix to this brief—especially the continuing initiatives of private industry and the Canadian Government concerning the Canadian alternative—demonstrate the transparency of Alaska's claim that "the Canadian alternative is not a real one." Ala. Pet. 30.

Nevertheless, the continuing dispute among the parties over such basic underlying matters—particularly regarding the data available and the efforts that the Interior Department has undertaken to develop, collect, and analyze data that would contribute to an informed assessment of the Canadian alternative—lends support to the court of appeals' conclusion that the district court did not perform its responsibility to refine the record and place the legal issues in an appropriate context for judicial review. Gov. Pet. App. A 91a-93a. Certainly, when the parties presented their case to the district court, no one anticipated that the court would issue only the broad legal conclusions that accompany its judgment. See Gov. Pet. App. D 179a-182a.

the preferred method for rights-of-way across public lands. Such a requirement would constitute a new and independent factor to be considered in any review of the multiple rights-of-way now contemplated for North Slope oil and natural gas.

There is, moreover, the distinct possibility that Congress will itself decide the "vital national questions" relating to the "routing and construction of a pipeline for Alaska's North Slope." Opening Statement by the Chairman, Senator Jackson, *Hearings Before the Senate Interior and Insular Affairs Committee on Pending Legislation to Establish a Federal Policy Concerning the Granting of Rights-of-Way Across Federal Lands*, 93d Cong., 1st Sess. 3 (March 9, 1973). At least four bills have been introduced that would produce this result.[13] Enactment of such legislation would presumably moot entirely the NEPA issues in the case.

The critical point is that Congress will, by adopting or refusing to adopt any of several pending legislative solutions, dispose of each of the policy issues —including the basic issue of whether the energy needs of the country and/or the revenue needs of the State of Alaska require immediate construction of

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[13] S. 970, S. 993, H.R. 4707, H.R. 5750. See pages 7-8, *supra*.

the Alaska Pipeline [14]—that petitioners have urged upon this Court as reasons for granting review.

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[14] The nation's needs for energy and the effect of Alaskan oil on alleviating those needs will undoubtedly be considered by Congress in light of the fuel shortages of last winter which occurred in the Midwest and East (where the Canadian alternative would deliver oil), not on the West Coast (to which oil from an Alaska Pipeline would be shipped). See appendix, *infra*.

The importance of the Alaska Pipeline to revenue for the State of Alaska and the Alaskan natives will undoubtedly be balanced by Congress against the energy needs of the Midwestern and Eastern states. Congress can also be expected to take cognizance of the Interior Department's own finding that "the amount of State revenue will not differ significantly under either the trans-Alaska pipeline system or a Mackenzie Valley pipeline system, assuming a 2 million barrel per day throughput of Alaskan oil through either system." *Interior Department's Analysis of the Economic and Security Aspects of the Trans-Alaska Pipeline*, vol. I, p. 8.

CONCLUSION

The sooner this phase of the litigation is terminated, the sooner will the issues be confronted squarely by Congress. The public interest, including that of sound judicial administration, will best be served by denial of the petitions for a writ of certiorari.

Respectfully submitted,

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APPENDIX OF DEVELOPMENTS

1. The fuel (oil and natural gas) shortages experienced in the Midwest and East this past winter would seem to require a reevaluation by Secretary Morton of his earlier conclusion that the West Coast (which experienced no such shortages) is the "preferable primary market for North Slope oil." Gov. Pet. App. C 163a. The Midwest and East would be served by the Canadian alternative; their oil shortages will not be helped by the Alaska Pipeline.

2. Canadian Arctic Gas Study, Limited, a group of Canadian and United States-owned companies (including several of the companies proposing the Alaska Pipeline) announced on February 27, 1973, that it will file applications with United States and Canadian Government agencies by late this summer for permission to build a natural gas pipeline from Prudhoe Bay through the Mackenzie Valley. (Press Release, February 27, 1973).

3. Mackenzie Valley Pipe Line Research, Limited, made up of several Canadian and United States owned-companies (including companies owned by firms active on the North Slope), issued, on January 22, 1973, a report summarizing its studies to date. The report concluded that a trans-Alaska-Canada *oil pipeline* is environmentally and economically feasible and could be completed in a substantially shorter time frame and at a substantially lower cost than the estimates previously cited by the Interior Department. (Press Release, January 22, 1973).

4. In addition to these private initiatives, studies sponsored by the Canadian Government, referred to by the court of appeals (Gov. Pet. App. A, 91a-92a), have continued in the year since Secretary Morton announced his decision. A comprehensive description of the studies already completed and the anticipated publication date of those nearing completion are contained in *Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development*, Issue No. 4, Canadian House of Commons, 29th Parliament, 1st Sess., March 1, 1973.

5. On March 18, 1973, in an interview on national television in Canada, Canadian Minister of Energy, Mines, and Resources, Donald Macdonald, strongly reasserted his Government's consistent position [1] in favor of construction of a common corridor for oil and gas pipelines through the Canadian Arctic: "If the Americans came back and said to us, look, we've had

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[1] From the earliest days of the Interior Department's consideration of the Alaska Pipeline proposal, the Canadian Government has consistently indicated that it favors construction of oil and gas pipelines through the Canadian Arctic. Ad. Rec. 4.3.2.1, Vol. IV, Tab I, Exs. 1-16. The reasons it has cited for this position are (a) its desire to avoid serious environmental and economic damage to the coastal waters of British Columbia that will be caused by the marine leg of the Alaska Pipeline proposal; (b) its realization that environmental disturbance will occur in any event from construction of a gas pipeline across the Canadian Arctic; and (c) its desire to open up Canada's own Arctic oil and gas resources. See, *e.g.*, letter from Minister Macdonald to Secretary Morton, May 4, 1972 (Plaintiffs' Ex. 1 to the Deposition of Deputy Undersecretary Carter).

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second thoughts on that Trans-Alaska Pipeline, we would like to take you up on your willingness to entertain an application about the oil line through the Mackenzie Route, I think the interests of the West Coast [of Canada] would dictate that he Government of Canada should enable that kind of application to go ahead." Transcript of Interview 5. In the same interview, Minister Macdonald renewed the offer of the Canadian Government, made earlier on April 19, 1972 (Ad. Rec. 4.3.2.1, Vol. IV, Tab I, Ex. 26), to supply additional amounts of secure oil to the United States for the period pending completion of the Canadian alternative. Transcript of Interview 4-5.

6. A recently released study by the National Oceanic and Atmospheric Administration (NOAA)—MARMAP Red Flag Report (No. 1), *Fish Larvae Found In Environment Contaminated With Oil and Plastic*, January 18, 1973—indicates that the Government has heretofore grossly understated both the extent, pervasiveness, and seriousness of oil pollution in the world's ocean waters.[2] The Interior Department's own experts have concluded that over the life of the Alaska Pipeline as much as 140,000 barrels of oil may be spilled in an average year into the ocean

[2] The study was the subject of editorial comment in *The New York Times* (February 18, 1973) and *The Washington Evening Star* (February 16, 1973) and extensive comment in *The Washington Post* (February 13, 1973) and the *CBS Evening News* (February 12, 1973).

waters of the Northeast Pacific (along the coasts of the United States and Canada) as a result of casualties involving tankers carrying North Slope oil. Final Impact Statement, vol. 4, p. 474. The Canadian alternative would, of course, require no marine transport of North Slope oil.